INDEX.

TABLE OF AUTHORITIES CITED

STATUTES CITED

In the

Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES OF AMERICA, THE Cincinnati and Columbus Traction Company, and Interstate Commerce Commission, Appellants,

vs.

THE BALTIMORE AND OHIO SOUTHwestern Railroad Company and The Norfolk and Western Railway Company, Appellees.

No. 648

APPEAL FROM THE UNITED STATES COMMERCE COURT.

SEPARATE AND SUPPLEMENTAL BRIEF OF ARGUMENT FOR THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, APPELLEE.

It is the purpose of this separate brief to set forth some arguments on behalf of The Baltimore & Ohio Southwestern Railroad Company, in addition to those in the principal brief for the appellees, in which the writer hereof joined, and which has been filed on behalf of both railroad companies.

The authority to order a track connection at Hills-

boro and at Madeira was rightly assumed by the Interstate Commerce Commission and the Commerce Court to be found, if it exists at all, in the last paragraph of Section 1 of the Interstate Commerce Act as amended June 18, 1910, which is published in Part 1, Volume 36, United State Statutes at Large, at page 547. In their briefs filed in this court, counsel for the Interstate Commerce Commission, as well as counsel for the United States, concur in this respect in the views of the Commission and of the Commerce Court.

Their claim is that The Cincinnati and Columbus Traction Company is a "lateral, branch line of railroad" within the meaning of this statute, and authorities defining lateral railroads and branch railroads are extensively quoted and cited in their briefs.

At the expense of repetition the paragraph in question is here quoted in full:—

> "Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make com-

plaint to the commission, as provided in section thirteen of this Act, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided, for the enforcement of all other orders by the commission, other than orders for the payment of money."

I.

It is to be observed that the line of the Traction Company is strictly within the definitionof a parallel and competing road.

Commonwealth vs. L. & N. R. R. Co., et al., 144 Ky. 324, 330, and cases cited.

East St. Louis Connecting Railroad Co. vs. Jarvis (34 C. C. A. 639), 92 Federal Reporter, 735, clause two of syllabus and opinion at 741, 742.

In the case first cited, the court say—144 Ky. 330:—

"Two parallel lines of railroad are not necessarily two lines equidistant from each, but are lines running in one general direction, traversing the same section of country and running within a few miles of each other. Two lines are parallel when they run between the same two points or localities (citing cases). It was perceived by the makers of the constitution that if there were two lines of railroad between two localities there would be more or less competition between them, and so they provided that one should not buy the other."

Between Hillsboro and Cincinnati, therefore, the

lines of the appellee railroads and of the appellant Traction Company are strictly parallel and competing.

II.

Assuming without conceding that the Traction Company's route may properly be described as "lateral" or "branch", it certainly is not such within the meaning of the statute quoted.

It is one of the requirements of the statute that the common carrier whose line is connected with the "lateral, branch line of railroad" shall "furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper". And it is provided that if the common carrier shall fail to install *and operate* a switch or connection *as aforesaid,* it may be required on application therefor in writing by any such shipper or owner of such lateral, branch line of railroad so to do. In other words, it is the requirement of the statute that the trunk line not only make the connection, but furnish cars for the use of the shipper on the lateral, branch line. But such a line and a "private side track" are placed on the same footing, and in determining what is meant by the former the maxim *noscitur a sociis* applies. It is not to be supposed that a connection with a private side track is required and yet that the owner of the siding shall be made to furnish his own cars up to the point of connection, the duty of the common carrier being limited to the operation of its own line and the connection. For such side tracks, when connected up, become part of the line of the carrier for the purposes of receipt and delivery of freight for the owner thereon.

Vincent vs. C. & A. R. R. Co., 49 Illinois, 33, 41.
1 Wyman on Public Service Corporations, section 817.

It is immaterial to the decision of this case whether,

owing to the length of the private siding or the lateral, branch line, or for any other reason, an additional charge may be made. Neither is it possible to separate the requirements with respect to private side tracks from those with respect to lateral, branch lines of railroad, so as to construe the statute to require in both cases the making of a connection, but in only one the furnishing of cars.

When the law-making body undertook to put owners of lateral, branch lines of railroad and owners of private sidings on the same basis as to track connections, the furnishing of cars, and the right to apply to the Commission for orders in connection therewith, it in substance affirmed that the lateral, branch lines were such as properly could be classed with private sidings.

Congress must, therefore, have had in contemplation as a lateral, branch line something different from the ordinary description of railroad. That this is so is evidenced not only by the history of the proceedings in Congress to which reference is made in the joint brief for the appellees, and which was also called to the attention of this court in Interstate Commerce Commission vs. D. L. & W R. Co., 216 United States, 531, 535 (abstract of argument, paragraph preceding opinion of the court), but is shown still more plainly by the record submitted to this court in Baltimore and Ohio Railroad Co. vs. Pitcairn Coal Co., 215 United States, 481.

See record filed in this court in the Pitcairn case November 10, 1908, Case No. 289, October Term, 1909, printed copy, paragraph at pages 467 and 468, where it is said "The Baltimore and Ohio Railroad Company has been supplying its cars for operations on the Cumberland and Pennsylvania Railroad since 1843." See, also, the opinions of the lower courts—that of District Judge Morris at pages 289 to 305, and that of the Circuit Court of Appeals at pages 899 to 921, as printed in the above record.

For convenience of reference, attention is called to the reports of that case in the lower courts as published in the Federal Reporter.

In United States ex rel. Pitcairn Coal Co. vs. Baltimore & Ohio R. Co., 154 Federal Reporter, 108, the Cumberland & Pennsylvania Railroad Company was described as a lateral road whose equipment was furnished by the Baltimore and Ohio. At page 109, District Judge Morris, stating the facts, said:—

> "This petition for mandamus, to require the Baltimore & Ohio Railroad Company to cease from subjecting the relator and other coal companies on the Monongah Division to undue and unreasonable discrimination in the shipping and transportation of coal, was filed January 16, 1907, by the relator, the Pitcairn Coal Company, a corporation of West Virginia, against the Baltimore & Ohio Railroad Company and the Cumberland & Pennsylvania Railroad Company and thirty-seven coal companies, most of them operating mines in West Virginia in what is known as the 'Fairmont region.' Of the defendants the Fairmont Coal Company, the Clarksburg Fuel Company, the Pittsburgh & Fairmont Fuel Company, the Southern Coal & Transportation Company, the Consolidation Coal Company, and the Somerset Coal Company are allied companies, practically all controlled by the Consolidation Coal Company, which also owns substantially all the capital stock of the Cumberland and Pennsylvania Railroad Company. The majority of the stock of the Consolidation Coal Company until May, 1906, was owned by the Baltimore & Ohio Railroad Company, and was then sold by the Baltimore & Ohio Railroad Company to Clarence W. Watson, acting for himself and his associates; the railroad company retaining a lien for a portion of the purchase money."

After considering a number of other questions, District Judge Morris said at pages 119 and 120:—

"A cause of complaint urged by the relator is that coal cars of the Baltimore & Ohio Railroad Company's equipment before they reach the Monongah Division of the West Virginia & Pittsburg Railroad operated by the Baltimore & Ohio Railroad Company are allotted to the Cumberland & Pennsylvania Railroad at its junction with the Baltimore & Ohio Railroad at Cumberland, and that this arbitrary allotment prevents cars coming to the Monongah Division, and gives an undue advantage to shippers on the Cumberland & Pennsylvania Railroad, to the prejudice of the shippers on the Monongah Division when there is a shortage of coal cars. The coal traffic on the Baltimore & Ohio Railroad began in 1843, and until 1855 was all from the Cumberland region and from mines *none of which were located on the Baltimore & Ohio Railroad, but were reached by lateral roads from the mines* to the Baltimore & Ohio Railroad at Cumberland and Piedmont. Several of the lateral roads became incorporated in the Cumberland & Pennsylvania Railroad, which practically is a combination and extension of the lateral roads to which, for half a century, the Baltimore & Ohio Railroad *has been supplying equipment* and by which the coal traffic which is its most important business was started and has been built up. It cannot be maintained that fair treatment to the new coal mines of the Fairmont region which are on the line of the Baltimore & Ohio Railroad requires that the old-established mines *on these lateral feeders* shall be deprived of the equipment which for half a century has been *furnished to them* and was being furnished when the relator began operating

its mine. The equipment furnished is based on the number of cars the Cumberland & Pittsburgh Railroad has had in previous years, and there is no sufficient evidence to show that it is an unfair allotment and works an unjust discrimination against the relator."

When the case came before the Circuit Court of Appeals—United States ex rel. Pitcairn Coal Co. vs. Baltimore & Ohio R. Co., 165 Federal Reporter, 113—that court in its opinion, beginning with the last line at page 114, substantially quoted the description given of the Cumberland & Pennsylvania Railroad Company by the Circuit Court. At page 131 the court quoted the provision of Section 1 of the Interstate Commerce Law as to lateral, branch lines of railroad, as the same was then in force, and at pages 131 and 132 observed:—

"It was undoubtedly the purpose of Congress in the enactment of this clause to secure for shippers located on branch or terminal lines the same kind of treatment that is accorded to those whose mines are located on the main line of the carrier, and, as we have heretofore said, we think the court's ruling to the effect that this is a branch or lateral line of the Baltimore & Ohio Railroad is proper, in view of the testimony bearing on that subject. However, when we come to consider the allotment of cars by the Baltimore & Ohio Railroad Company to the Cumberland & Pennsylvania Railroad Company, *we are of opinion that such allotment should be made on the same basis by which the Baltimore and Ohio Railroad is required to allot cars to its own shippers.* We do not understand upon what theory the system now in vogue, by which cars are allotted to these branch or lateral lines of road, can be sustained. Therefore we think that the Baltimore & Ohio Railroad Company

by the provisions of the interstate commerce act *is required to furnish cars to the Cumberland and Pennsylvania for the use of shippers on said road*, but in doing so, due regard should be had to the system by which the Baltimore & Ohio Railroad Company distributes its car service to the patrons along its lines."

It is quite true that the judgments of the Circuit Court and the Circuit Court of Appeals were reversed by this Court—215 United States, 481—and of course the passages from the opinions of the lower courts are not quoted as authority. They do, however, illustrate in the most forceful manner what Congress may have had in mind when it provided not only that a connection could be required with a "lateral, branch line of railroad," but also that the principal line should *furnish equipment for the use of shippers on such lateral line*. These opinions and the record of that case in this court, cited at page 5 above (record, pages 467, 468 and 460 middle paragraph), indicate that since 1843 there has been a class of railroads in this country known to shippers not only as lateral, branch lines of railroad, but as lines whose equipment has been furnished by the trunk lines with which they are connected. It is certainly fair to suppose that those interested in this particular legislation and in bringing about the amendment of June 18, 1910, were familiar with this class of lateral, branch lines of road, and that the double requirement of track connection and furnishing of cars was inserted with that in view. And as the last amendment followed upon the decision of this court in the Rahway Valley case (216 United States, 531), and the decisions of the lower courts in the Pitcairn case, it is at least very suggestive that even if the interpretation of these words for which we contend was not prominently in the mind of Congress in 1906, it was so at the time of the amendment in 1910.

Moreover, had Congress intended in 1906 or when amending the act in 1910 to provide that a railroad company be "required to furnish cars" to a parallel and competing line, it most certainly would, in view of the decisions in the Stock Yards cases (192 United States, 568, and 212 United States, 132), have used words clearly evidencing such intent and negativing the thought that the requirement was limited to lateral, branch lines and private side tracks.

Further, it is elementary that a court will look to the "history of the times" in determining what a statute means. (11 Ency. of U. S. Supreme Court Reports, 144, note 57). This it may learn not only from the ordinary current periodicals, but from the reports of decisions of lower courts and administrative tribunals, the correctness or incorrectness of their opinions as to the law being immaterial from the standpoint of determining from them the practical existing conditions, of which Congress may be presumed to have been advised.

It is well known that lateral, branch lines, which are in many respects only plant facilities, and so rather themselves to be classed as private side tracks than as trunk lines or railroads proper, are common throughout the country, and have been for many years. Their status as shipping facilities rather than common carriers has been recognized by the Interstate Commerce Commission time and again. See, for example—

> Crane Railroad Co. vs. Philadelphia & Reading R. Co., 15 I. C. C. Rep. 248; and
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> Crane Iron Works vs. Central Railroad Co. of New Jersey, 17 I. C. C. Rep. 514;

in the first of which cases it was distinctly held that "through routes and joint rates on interstate shipments" could not lawfully be established between the Crane Railroad Company and a trunk line.

In view of the requirement that common carriers subject to the provisions of the statute furnish cars

not only for private side tracks, but for lateral, branch lines of road, it may well be that Congress had in mind, among others, such lines as that of the Crane Railroad Company, deeming that it might constitutionally make such requirements as to them, although manifestly that could not be done as between two such roads as—for example—the Southern and Louisville & Nashville, which were interested in the Stock Yards cases (192 U. S. 568 and 212 U. S. 132).

Whether, in going so far as to require the furnishing of cars for lateral, branch lines, as well as for private side tracks, Congress acted within its powers need not be determined until a road coming within that description shall present its case to the court. It is entirely clear that if the statute be construed as applicable to a carrier such as The Cincinnati & Columbus Traction Company, it would apply with like force as to the Southern or the Louisville & Nashville, and would be unconstitutional.

As between two constructions, one of which clearly would render the statute unconstitutional as in direct conflict with a prior decision of this court (192 U. S. 568), and the other of which would only suggest doubts as to its validity, there can be no hesitation as to which should be adopted. And whatever else may be said of it, the line of The Cincinnati & Columbus Traction Company is not a "plant facility," and its owners can not, without further legislation for their protection, require these appellees to turn over their equipment for its use.

It is not enough, therefore, that counsel for the Interstate Commerce Commission and the Government establish by their authorities that The Cincinnati & Columbus Traction Company is in one sense of the word a "lateral, branch line of railroad." They must go further and show that it is so closely allied to shippers as to bring it within that class of such railroads which may fairly and constitutionally be entitled to have cars furnished it by the appellees

for the use of shippers on its line on an equal basis with those on their own lines.

III.

The Traction Company is a corporation organized under the laws of the State of Ohio as a street electric railroad, and is not and never was engaged in interstate commerce, and Congress in the Interstate Commerce Act has not covered such a carrier, and its charter rights and privileges are such as that it can not properly be made a connecting road with the appellees.

There is no question but that the power of Congress as to interstate commerce is absolute as against the rights of the states; but in determining what is meant by a "lateral, branch line of railroad", as well as in determining whether through routes or rates should be established, the essential character of these artificial bodies can not be ignored. The differences between the charter of the Traction Company and those of the steam railroad companies are fundamental, and being embodied in the statutes of Ohio, are of course judicially noticed by this court and the Commerce Court.

The Ohio law respecting street and interurban railroads is contained in the General Code of Ohio, sections 9100 to 9149, inclusive, and in supplemental and amending sections, while steam railroad companies are governed and controlled by sections 8922 to 9099, and supplemental and amending sections. By reference to the sections cited it will be seen that the provisions for the government of steam railroads are wholly dissimilar from those for the government of such railroads as that of the Traction Company, in the following particulars, among others, namely, as to track elevation (sections 8763 et seq.); diverting roads or streams (8773); construction of bridges (8774); bridging of canals or navigable rivers (8775); the height of bridges over canals (8776 and 8777); joint use of bridges (8779 and 8780); the

power to aid connecting lines and to lease or purchase other railroads (8806-8814); regulations as to crossings of other railroads (8826 et seq.); the avoidance of grade crossings (8835 et seq.); crossing of tracks of other steam railroads in municipalities (8840); changing of grades (8841); regulations with respect to highway crossings (8843 et seq.); regulations with respect to private crossings and ways over their tracks (8858 et seq.); altering or abolishing grade or other crossings (8863 et seq.); crossings of railroads by highways subsequently constructed (8895); drainage (8908); fences, cattle guards and crossings (8913 et seq.); equipment of engines and the doctrine of negligence in connection therewith (8944 and 8945); automatic air brakes (8946); power brakes on engines (8947); and for cars (8949); automatic couplers (8950); grab irons (8951); draw bars (8952); inspection laws (8957-8965); liability for fires (8966-8974); construction of overhead wires (8975-8976); the rates to be charged for freight transportation (8980-8988); the minimum recoverable as damages in certain cases (8991); as to storage and warehouses certificates (8995); as to switching cars of other companies and allowances therefor and penalties on account thereof (8998-9004); hours of service(9007); blocking frogs and the like (9009); liability for injuries to employees (9015-9018); consolidation and other charter powers and provisions (9025-9053).

These fundamental differences were recognized by the Ohio Legislature when it provided in section 522 of the General Code (quoted by the Commission in this case, 20 I. C. C. Rep. at 487, and page 9 of the transcript) as follows as to track connections:—

> "Steam railroad companies as between themselves, and interurban and electric railroads as between themselves, shall afford reasonable and proper facilities for interchange of traffic be-

> tween their respective lines, for forwarding and delivering passengers and property, and shall transfer and deliver without unreasonable delay or discrimination cars, loaded or empty, freight or passengers, destined to a point on its own or connecting lines ....."

Attention is called to some of the foregoing statutory provisions, as marking the essential difference between the two classes of railroads as to rights they may derive from counties and municipalities. This dissimilarity has been often commented on by the state courts.

> "The statutes of this State relating to railroads are separate and distinct from those relating to street railroads." Massillon Bridge Co. vs. Cambria Iron Co., 59 Ohio State, 179, syllabus by the court.

> "An interurban electric railroad is classed as a street railroad by the statutes of this State". C. L. & A. Elec. St. Ry. Co. vs. Lohe, 68 Ohio State, 101, clause one of syllabus. See also Commissioners vs. Scioto Valley Traction Co., 75 Ohio State, 548.

It is not contended that track connections and inter-change of cars may not be required on the sole ground that one of the carriers operates by steam and the other by electricity, or that one renders an interurban service and the other is an established trunk line traversing several states. Interurban electric roads often (as in Illinois) have the same charter powers as steam railroads, and are organized under the steam railroad laws and *constructed, maintained and operated in conformity thereto.* Such is not the case with respect to The Cincinnati & Columbus Traction Company.

See Ecorse Township vs. Jackson A. A. & D. Ry. Co., 153 Mich., 393 (117 Northwestern, 89), wherein,

at page 397 (117 Northwestern, 91), the court quotes from the opinion of Judge Cooley in Grand Rapids & Indiana R. Co. vs. Heisel, 38 Michigan, 62, as to the fundamental differences between steam and street railways. A requirement that they become in effect partners in business would be to confer upon each of them property rights as against municipal corporations and property owners, and give the steam railways, for example, interests and privileges in and over the streets which it was never intended they should have.

The Traction Company is not engaged in interstate commerce, and it is of course a truism that the State of Ohio may not forbid or interfere with such commerce. But in determining whether connections should be made between the lines of these petitioners and that of the Traction Company, regard must be had to the nature and character of the electric line, as evidenced by its state charter and the business it conducts, as also the equipment with which it is expected to be supplied and the road bed and right of way it maintains and operates. Congress in the Interstate Commerce Act has not legislated with a view to incorporating carriers nor taken away from the states the right to determine the charter limitations of their corporations. And the holding of the Commission in this case is inconsistant with its own previous rulings.

> Cosmopolitan Shipping Co. vs. Hamburg American Packet Co., 13 I. C. C. Rep. 266, 280; and In Re Parmalee Company, 12 I. C. C. Rep. 39.

In the last cited case, the question was whether, under the Interstate Commerce Act, section one of the pass provisions, a pass could be lawfully issued by a steam railroad to an employe of the Parmalee Company, which was a transfer company in Chicago en-

gaged in intrastate business, transferring passengers and baggage to and from the railroad stations and places in Chicago. This question went back necessarily to that of whether the Parmalee Company was a carrier subject to the Act to Regulate Commerce. The Commission found it was not such a carrier.

Would there be any doubt under the ruling of the Commission (which we do not question) in the Parmalee case that the two steam lines in the case at bar could not lawfully issue exchange passes to the employes of The Cincinnati & Columbus Traction Company? If the contention of counsel for the government is correct, then it must follow that if this track connection were ordered made, the conductors and motormen of a Traction Company operating its cars from point to point in Cincinnati would be entitled to interstate transportation over the trunk lines from Maine to California.

Considering the charter rights and powers of the Traction Company, its status is more analogous to that of a drayage or transfer or stage company than to that of a steam railroad company engaged in interstate commerce. And as to a stage company, the Interstate Commerce Commission has distinctly decided—and we doubt not correctly (with reference to a stage line operating in Yellowstone Park), in Wylie vs. Northen Pacific Ry. Co., 11 I. C. C. Rep. 145, 154, as follows:—

> "We hold that the defendant railway is without authority to make traffic agreements, of the nature and effect shown in this case, either with the transportation company which provides stages for touring the park or with the association which conducts the hotels therein. *The parties are not competent in law to form through routes and establish joint rates* as provided in the sixth section of the Act to regulate commerce, and the circular or tariff under which the rates

and tickets in question are provided cannot be regarded as a joint tariff established by connecting carriers under authority of that statute."

It may be assumed that Congress could, if it saw fit, provide that stage companies or common carriers by ordinary vehicles should as to their interstate commerce be brought under the jurisdiction of the federal law, and made connecting carriers with respect to steam railroad companies, and that additional charter powers and rights with their corresponding obligations, might be conferred upon such a corporation as The Cincinnati & Columbus Traction Company. But that has not yet been attemped.

After all, the error of the Commision runs back to the fundamental error, detected and corrected by the Commerce Court, of ordering switch connections and through routes with a competing and parallel interurban traction company which was not and never could be a lateral, branch line of railroad within the meaning of the Act of Congress upon which alone the jurisdiction of the Commission depended.

Respectfully submitted,

EDWARD BARTON,

Attorney for The Baltimore and Ohio Southwestern Railroad Company, Appellee.

Cincinnati, Ohio, October, 1912.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES OF AMERICA et al,
Appellants,

No. 648. *vs.*

THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY and THE NORFOLK AND WESTERN RAILROAD COMPANY,
Appellees.

BRIEF FOR APPELLANT, THE CINCINNATI & COLUMBUS TRACTION COMPANY,

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This case was brought in the Commerce Court by the Baltimore & Southwestern Railroad and the Norfolk & Western Railroad Company against the United States Government and the Cincinnati & Columbus Traction Company. Afterwards the Interstate Commerce Commission intervened. The purpose of the action was to enjoin the enforcement of a certain order made by the

Interstate Commerce Commission in favor of the appellant, the Cincinnati & Columbus Traction Company. The Cincinnati & Columbus Traction Company is what is known under the laws of the state of Ohio, as an Interurban Electric Line, running from the city of Norwood, contiguous to the city of Cincinnati, Ohio, to Hillsboro, in Highland county, in said state. Under the laws of the state of Ohio, its charter powers include the right to carry freight, mail and express, and it is so substantially built, as to enable it to do all sorts of business that is usually transacted by what is known as a steam or commercial railroad.

On or about January 21st, 1909, this appellant filed with the Commission its petition grounded upon the Interstate Commerce Law, asking that an order be made directing a physical connection between the roads of defendants, and the road of this Interurban road at Madeira, and at Hillsboro, Ohio, where the roads approach each other and come into close proximity, and said petition included a prayer for connection with the Cincinnati, Lebanon & Northern Railroad at Norwood, where the two roads come within five (5) or six (6) feet of each other. The petition further asked for the establishment of through routes. This appellant's railroad crosses the Norfolk and Western Railroad, at a point very close to Hillsboro.

This petition to the Commission was heard, and a large amount of evidence introduced, and finally resulted in an order of the Commission granting the prayer thereof as to the physical connections and directing the establishment of through routes, and rates between and including Boston on the West, and Dodsonville on the East, and it

was this order that the complaining roads in this case sought to have annulled. It was annulled by the Commerce Court. The petition filed with the Commission was grounded upon Sections 1 and 15 of the Interstate Commerce Act. The facts upon which this court may be called upon to act have been set out at large in the printed briefs on file.

Much has been said in this case by way of argument that the appellant traction road is not a branch or lateral road, within the meaning of Section 1 of the Act, but an independent and competing line. The question is argued as to whether or not the traction road belonging to the appellant company could consolidate with the road of the appellees, under the statute laws of the state of Ohio, and further whether the Commission had any power without the knowledge of both parties, to send somebody over the road to look at its physical condition, and whether or not it had any power to decree a connection at the expense of the Traction Company, without violating the constitutional provision that the appellees were deprived of their property without due process of law.

The Commerce Court itself grounded its decision upon the one simple fact that the road of the appellant Traction Company was not within the law, because not included within the definition of a branch or lateral railroad, and therfore if the Commission received evidence that it ought not to have received, and ordered a connection without fixing the compensation to the appellees, this did not deprive the Commission of jurisdiction if it was once vested. They were merely errors committed in the trial of the case, which could be remedied upon a retrial, without holding that the Commission had no juris-

diction. The rule is, that if in a court of error, it appears that the court below decided the case upon some one proposition which is erroneous, and did not consider the merits of the controversy at all, the judgment should be reversed, if that single proposition is erroneous. In other words, everything else is mere error of procedure, not going at all to the right of the Commission to hear the controversy in a proper way.

The court went to the root of the matter in this case. The alleged invalidity of the order of the Interstate Commerce Commission was grounded upon several technical objections, but the real gist of the controversy finally hinged upon the fundamental power of the Commission, and upon the point that the Traction Company's railroad was neither a lateral nor a branch railroad, nor a lateral-branch railroad—whether the law refers to one or two classes of railroad by the use of those two words—within the meaning of the law.

The Traction Company is incorporated under the laws of the state of Ohio, and owns and operates, by electric power, an Interurban Railroad between the city of Norwood contiguous to the city of Cincinnati, Ohio, and Hillsboro, in Highland county, Ohio, a distance of about 53 miles. It is of standard gauge with seventy pound steel rails and Weber joints. Its superstructure is solidly and substantially constructed, and in every way is fitted to do a freight business of moderate dimensions. These roads are denominated Interurban Roads under the laws of the state of Ohio. They are in some respects likened to street railroads, in other respects to steam railroads, depending upon the locality in which they run and the nature of their service. In cities they are like street rail-

roads. Outside of cities like steam railroads. But after all, they are Interurban Railroads, and neither street nor steam railroads; outside of cities they have power of condemnation of private property for their legitimate purposes. Inside cities they have power of condemnation for certain enumerated purposes only. They are authorized to carry freight, mail and express.

See General Code of Ohio, Secs. 9100, *et seq.; Ohio* v. *Dayton Traction Co. et al,* 18 Cir. Ct., 490, affirmed 64 O. S., 272.

It seemed to weigh very much upon the mind of the court at the hearing that this Interurban Railroad was different from an ordinary commercial railroad, and that it was an independent and competing road, and for these reasons was not a lateral, a branch, or a lateral-branch railroad, and therefore was not covered by the terms of the law. The court betrayed much anxiety to ascertain whether or not the road of the Traction Company, if it were something other than it is, if it were a steam or commercial railroad, under the laws of the state of Ohio, could be consolidated with either of the complainant's roads.

The Commission in its opinion on record, page 30, classes this appellant's road, not as a lateral or branch road, but as an independent and competing line. Of course, to say that Congress has no power to include an independent or competing line within the Commerce Law, would be a fallacy. The only question is, what did Congress intend to enact. If by an independent line, the Commerce Court intended to draw distinction between organizations, to-wit, whether the line was a branch or lateral stem of the main road of one of the appellees, un-

der the same ownership and organization, or one which was under separate ownership and organization, it would seem that the answer is obvious if our road was owned by one of the main companies, it could hardly make an application, or enforce one, for the reason that the application would be to itself, and the proceeding, if the application were denied, against itself, and hence we must start out with the theory that the lateral or branch railroad intended to be reached by the law, is necessarily one independent of the appellee's road.

Again, if it were the former kind of branch, no application could be made except by a shipper or receiver of Interstate Commerce and could only be on the ground of discrimination by the main stem against certain localities and portions of its own line.

The purpose of the Commerce Law is to prohibit and restrain all discriminations. It makes no difference whether the discrimination is between localities on its own line, or as against other means of conveyance. Any road that would approach another could be a branch of that other, or an independent line. It would therefore seem that the effect that the complaining road is an independent line would cut no figure in the case at all, as evidently the law can only apply to such a line. It is therefore submitted that that method of differentiation as a working basis, is unsatisfactory. On the other hand, if it is sought to add to that by calling it a competitive line, we venture the assertion that no line, branch, lateral, or a road which is a mere continuation in a straight line of the other, can be wholly non-competitive, but competition in the first place is favored by the law, and in the next place, it is made no ground of distinction by the law itself.

All roads that are near enough to each other to require running arrangements, are more or less competitive, some indirectly and to a small degree, and others directly, and as to their main through business. It is difficult therefore to understand how independence and competition can remove a railroad from the remedial operation of the law.

It is stated in the opinion of the Commerce Court that it was admitted that the appellant railroad, under the laws of the state of Ohio, could not consolidate with one of the appellees. So it was admitted, but not on the ground that it was parallel or competitive with the appellees' railroad; but simply because no roads can consolidate without statutory authority, and in the state of Ohio there is statutory authority for the consolidation of steam railroads with each other, and for the consolidation of Interurban Railroads with each other, but there is no statutory authority for the consolidation of Interurban Railroads with Steam Railroads, and in fact, by the terms of the respective laws, such a consolidation is excluded.

It may be true that the Legislature of the state of Ohio did not see fit to make the latter kind of consolidation legal, because the two classes of railroads are organized under different laws, are generally constructed in different ways, and, to a large extent, serve different purposes, but the true reason why they can not consolidate is as above stated, that the statutes do not permit it. This consideration does not alter the fact, however, that in certain respects, and among others the carriage of freight, they do serve the same purpose, and where that purpose is to engage in interstate business, no question can arise as to the power of Congress to delegate to the Interstate

Commerce Commission the same power to regulate that business as exists over the regulation of two steam railroads.

It is a simple question, therefore, and the Commerce Court admits it, whether Congress has delegated the power to the Commission to regulate Interstate Commerce between railroads like the appellant's and the appellees' road. A full consideration of the cases would seem to establish that the appellant road is not a competing road with the railroad of either of the appellees, in the sense that the business is exempt from the operation by the Interstate Commerce Law, because that either one of the appellees might not purchase and own the appellant road, or even consolidate with it. If the distinction had been placed merely on the ground that the roads of the appellees are steam railroads, and the appellant road is an electric road, and that therefore the roads are of different characters and serve different purposes, that might have been a tangible distinction, but that involves the proposition that the law does not regulate Interstate Commerce at all if it happens that the instrumentalities engaged in the complete journey are of a different character or mode of transportation, and it involves that if the roads are similar in a certain class of business sought to be regulated, only differing in other respects, then there is the same defect of power.

In regard to the judicial definition of lateral or branch railroads, it may not be inadvisable to call the attention of the court to the fact that in several states there are special statutes authorizing railroads to build branch or lateral roads. In the sense of these statutes, they are parts of one main line, and serve the purpose of supply-

ing what might otherwise be considered as an absence of charter rights after a railroad has once located its main line. The decisions upon these statutes do not attempt to give theoretical definitions of branch or lateral roads, other than this, "A lateral road is but another name for a branch road, and a lateral or branch road is one which proceeds from some point on the main track between its termini, and is an appendage to, and properly a part of the main road." *L. S. & M. Ry. Co.* v. *B. & O. &c. Ry.*, 142 Ill., 272.

In *McAvoy's App.*, 117 Pac., 548, it is said that a branch does not depend on length or direction.

In *Vollmer's App.*, 115 Pa., 166, a branch was twice as long as the main stem.

In *Atlantic & Pac. Roads* v. *St. Louis*, 66 Mo., 28, an extension was built as a branch and upheld.

In *Blanton* v. *R. F. & P. Ry. Co.*, 86 Va., 618, it was held that a branch or lateral road may connect the main line with another road.

In *W., B. & T. Ry. Co.* v. *Camden Con. Oil Co.*, 55 W. Va., 205, it was held that a branch road might be a branch of a branch road.

In *Shoenberger* v. *Mulholland*, 8 Pa. St., 134, the owners of a coal mine had built a road to connect with another line, and it was held to be properly a lateral road, the only characteristic being that it was a common carrier.

That such branches or appendages to a main stem, and owned by it, under the charter and organization, are not the kind of road intended by the Act of Congress, is explained from the wording of the act itself, which applies to any lateral branch line of railroad tendering inter-

state traffic, and provides for a switch connection of any such lateral or branch railroad or private side-track, which may be constructed to connect with the main line of another railroad, where such connection is reasonably practicable, and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of the same, and such other railroad shall furnish cars for the movements of such traffic to the best of its ability, without discrimination in favor of, or against, any such shipper. These provisions are utterly inapplicable to a branch or lateral road which is simply a part of, and owned by the main line, and already connected with it.

This is further shown by the proceedings taken from the Congressional Record, furnished to the court below by counsel for the appellees.

On May 17th, 1906, pages 72-125 of the Congressional Record, an amendment adopted in the committee of the whole, was concurred in and further amended, and on pages 8158 and 8159, this colloquy between Senators Hale, Spooner and Elkins occurred:

> "Mr. Hale: What is the significance actually and practically, different from a switch of the words 'a lateral railroad?'
>
> "Mr. Spooner: A lateral railroad is built from the side. It may be 20 miles; it may be 10 miles; it may be 50 miles; it may be 100 miles.
>
> "Mr. Hale: But it is an independent line?
>
> "Mr. Spooner: Certainly.
>
> "Mr. Hale: It is only associated with the trunk line by physical connection?
>
> "Mr. Spooner: It is associated with the trunk line in this, that it brings the trunk line business.
>
> "Mr. Hale: It is an independent organization.

"Mr. Spooner: Certainly. It is not a competitor; only a feeder.

"Mr. Hale: It is a feeder?

"Mr. Spooner: That is all.

"Mr. Hale: And it is only associated with the trunk line by its connection which brings business?

"Mr. Spooner: That is all.

"Mr. Elkins: It is a switch connection.

"Mr. Hale: The Senator from West Virginia says it is a switch connection. It is more than that.

"Mr. Elkins: It has to be a switch connection.

"Mr. Spooner: To state it shortly, it is such connection as will enable the transfer of cars from one to the other interchangeably.

"Mr. Hale: But it is not what we commonly understand by a switch connection of short lines of road itself; it is independent.

"Mr. Spooner: It is independent.

"Mr. Hale: It is not a switch connection.

"Mr. Spooner: A firm, a coal company, or a group of independent coal mining companies are unable to get cars, they are unable to obtain switches, they are unable to connect with the line upon which they are dependent to get to market, and they may organize a little company and build 10 miles or 20 miles of railroad. Of course it is a common carrier; it has to be. Constructing that road to a connection with the long line engaged in interstate commerce, there is every reason in the world why, upon fair terms, it should be permitted to connect with that railroad, so as to be able to secure an interchange of traffic and cars on fair terms.

"Mr. Hale: Through transportation.

"Mr. Spooner: Certainly. Now, that is all this is. It will apply and be of great value in respect to coal production; it will apply and be of great value in respect of lumber production, and it will apply and be of great value for very many purposes which I need not take the time to go over. This is very important in many ways to the public, and is perfectly competent for the conferees to agree to."

Perhaps the nearest definition or rather description of what a branch or lateral road is, as the terms are used in the law, is found in the case of *the Interstate Commerce Commission* v. *The Delaware, Lackawanna & Western Railroad Company,* 216 U. S., 531. At page 537 of the opinion in this case, the court says:

> "The question is raised whether the Rahway road is a lateral, branch line of railroad relatively to the appellees. There certainly is force in the contention that the words of the statute mean a railroad naturally tributary to the lines of the common carrier ordered to make the connection, and dependent upon it for an outlet to the markets of the country, which, according to the bill, the Rahway road is not. There is force in the argument that a road already having connection with the roads of two carriers subject to the Act and having joint and through rates with them, can not be regarded as a lateral branch line of railroad of another road situated like the appellee. On the other hand, it would be going far to lay down the universal proposition that feeder might not be a lateral branch road of one line at one end and of another at the other. We leave this doubtful question on one side, because we agree with the Circuit Judges in the considerations upon which they decided the case."

It will be observed that the court treats it as a matter of fact. It was pointed out that the Rahway road was only ten miles long and already had two outlets to the commercial world. It was held that that road was not a feeder of the Delaware road. The plain intimation is that if it were a feeder and especially if it had no other outlet, and shippers along its line had no other resource for the shipment of interstate traffic, then a different result would have followed. For the law was made mainly

for the benefit of the people, and is not the least among these entitled to consideration.

If there be any question at all involved here it is whether the interurban road is a mere parasite or fungus growth? Or on the other hand does it serve a useful purpose in the channels of commerce? Does it feed the larger lines with a business more conveniently for the shipper without any further detriment to those main lines than results from the prevention of monopoly on the part of those lines as to a small portion of the carriage. Does not the Traction Company simply, mainly relieve the shipper from that expensive and onerous burden of getting his goods to the main line? A large question here is whether if the order of the Commission were enforced, it would result in taking business from the complaining lines that otherwise they would get. That ought to be the supreme test of the question whether the traction line is a parallel and competing line. It would be fallacious to suppose that shippers from points along the line of the traction road, no matter what the outcome of this case is, would not continue to ship in that manner by that road in preference to carting their goods a maximum distance of twelve miles over country roads, sometimes almost impassible, in order to deliver it at a station on one of the main lines when the purpose of the traction company is to deliver it to the same lines probably for just as long a haul. Will a system be perpetuated which compels the transaction of a traffic, which will always be the traffic of the traction company, in a manner the most inconvenient and expensive, on some fanciful theory that the roads are of a different kind, when, in the feature which the interstate commerce law concerns it-

self with, they are alike. The fact that the main lines will not get the business naturally going to the traction line except over that line, even if the order of the Commission be nullified, would seem to demonstrate that the traction road is in no sense a parallel or competing line in a legal sense. If the state statutes prohibit the consolidation of competing lines for the purpose of conserving competition, can the prevention of competition, if it exists, be within the purview of the act of Congress? That it is not, is illustrated by those decisions, one by this court, that a forwarder may collect packages from different consignors sufficient to make a carload and get carload rates on the ground that the law is not concerned with the ownership of the contents of the car, and by the principle that a railroad has no claim in law to lessen the natural advantages of any section or locality.

> *Judson on Interstate Com. Law*, page 226, Sec. 184.

See also in this connection

> *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western Railroad Company*, 220 U. S., 235.
> *No. Securities Company* v. *U. S.*, 193 U. S., 197.

If the order of the commission is enforced, it will tend to build up traffic that now does not exist and never will exist for any line. It will cause the location of new industries along the Traction Company's line which will create railroad traffic, and develop and enrich, to a degree, a certain belt of territory which at present is practically "bottled up" and which now has no practicable outlet. If the Act of Congress is broad enough to include

every instrumentality of Interstate Commerce and every kind of railroad,

See *Omaha and Council Bluff's case*, 191 Fed., 40,

And if the meaning of the term railroad in one part of the act is wide enough to include all kinds of railroads, why does not the use of the same term in connection with the words "lateral" and "branch" have as wide a signification and include lateral or branch traction roads?

If the maintenance of competition is the object of state laws against combinations so it is the object of the act of Congress to foster and at least deal, even with competitive roads as they exist, although that competition so far as it exists be stunted for want of that sustenance which its neighbors of larger growth may accord to a small interstate commerce contrivance.

We should rather pay more heed to the Spirit which gives the life than stick in the bark.

Bearing in mind that it is not the office of the commission to either create or stifle competition, but simply to deal with as it exists, and further considering that we can hardly be called a competitor for business that we can only gather up and deliver to them, and if our business increases it does so only by the creation of new business that otherwise would not exist for any one, and that our present business will continue to be carried by our line and delivered to them no matter what the outcome of this suit may be, though in a way very expensive and onerous to shippers and receivers it may not be out of place to quote from a few cases involving competitive lines which seem to hold that competition must be substantial, and not merely incidental and partial, protesting however that it is not the office of the commission to

create or destroy competition but only to deal with a status already created, and to exercise thereon its powers under the law.

In the case of *The Dayton & Union Railway Company* v. *Pittsburg, C., C. & St. L. Railway Company*, 28th Ohio Circuit Court, 705, the court held that:

> "A trackage contract between two railroad companies forming connecting lines, except for a 15-mile parallel track build and operated by one upon the railroad of the other under a contract alleged to be *ultra vires*, is not *ultra vires* when it has for its object the taking up of such parallel track, thereby restoring the company to its former status of a connecting and competing line, and substituting, in lieu of the parallel track, a traffic arrangement which is within the enumerated powers of connecting railroads, and which contract does not destroy, but creates competition between them."

This case was affirmed by the Supreme Court of Ohio, in the 67th Ohio State Report, 523.

In the case of *The Illinois Trust Company* v. *St. Louis, etc., Railroad Company*, 217 Ill., 504, the third and fourth paragraphs of the syllabus read as follows:

> "3. In determining whether a railroad in Illinois, purchased by a foreign corporation, and the original railroads owned by such corporation are parallel or competing lines within the meaning of the act of 1899 (laws of 1899, page 116), the line which the local railroad had power, under its charter, to construct, as well as the portion of the line constructed must be considered.
>
> "4. A foreign and a local railroad are not 'parallel or competing lines' where line of the former between the termini of the latter is much longer and more indirect, requiring a change of cars and ferry-

ing, and where no through trains between those points are run on a foreign railroad, no through business solicited or encouraged and no terminal facilities provided for at one terminus of the local road, and no freight or passenger rates made to compete with the local road or the local competitors of the latter."

In the case of *Burke* v. *C., C., C. & Indianapolis Railroad Company*, 22 W. L. B., 11, at page 14 of its opinion, the court says:

"2. It is urged further that the lines of railway proposed to be consolidated are competing lines and therefore their consolidation would be in violation of the statute and contrary to the policy of the state.

"In the case of *State* v. *Vanderbilt* (37 O. S.), the Supreme Court held that 'the lines of two railroad companies which are in their general features parallel and competing' can not become consolidated into one corporation under Section 3379 of the Revised Statutes. In that case, the two roads, with their leased lines run from Cincinnati, northerly one to Cleveland, and the other to Toledo, and for 60 miles, or from Cincinnati to Dayton, the roads are parallel, and near to each other. These roads (C., C., C. & I. and C., H. & D.), the court found were, in the general features not only parallel, but competing —a fact apparent from the mere statement of the location of the road.

"In the case now before us the Big Four and Bee Line are in no sense parallel—indeed it would be nearer to say that they run at right angles to each other, since the general direction of the Bee line is from the northeast to the southwest, while that of the Big Four is from the southeast to the northwest. Are they competing lines? It is said a reference to the map of the two lines clearly shows that they are. The westerly connection of the 'Bee line' makes southwesterly from Indianapolis to Terra Haute and

St. Louis, while that of the Big Four makes northwesterly to LaFayette and Kankakee. The points reached are widely divergent, and the idea of competition would hardly occur to the popular mind from an inspection of the map, yet it is not to be doubted that there is some competition for through business destined to and from the seaboard and Eastern states, and also for business at points west of Indianapolis, resulting more, perhaps, from crossing and intersecting other lines that serve as feeders than that the two roads in question trend in the same direction or the same commercial centers for we think such is not the case; and while there is incidental competition between these roads as there is between either one of these roads and many others, that might be named, we are disposed to hold that in no proper, legal or commercial sense can they be said to be in 'their general features and from a geographical standpoint, competing lines.' "

In the case of *Railroad* v. *Rushing*, 69 Texas, 313, the court, in its opinion, says:

From page 313:

"If therefore the lines of these two roads do not connect, the sale was unauthorized, because the purchasing company had no power to buy; and if they were parallel or competing lines it was unauthorized because the appellant company had no right to sell. It may be that this court judicially knowing the geography of the state might take notice from the general direction of these two roads as fixed by the statutes under consideration that their lines must necessarily cross each other and therefore could treat them as connecting lines and not parallel to each other. But as to whether they were competing lines, we have no judicial knowledge whatever. Competition between railroads may exist and yet their lines might run parallel but cross each other at some point in their route. Hence when a question as to such

competition is raised the court or jury must have proof upon the subject as in the case of any other fact submitted for its consideration."

It was held in the case of *George Hafer* v. *The C., H. & D. Railroad Company*, 4 Ohio Decisions, 487, that whether lines are competitive does not depend on their being engaged in cutting rates, but on their opportunity from geographical situation to do so, and maybe so though none of the lines reach competing points by arrangement with other lines.

The Empire Trust Company et al v. *Egypt Railway Company*, 182 Fed. Rep., 100, the court at page 104 quotes with approval from *Hancock* v. *Louisville Railroad Company*, 145 U. S., 409, construing a charter empowering a lease, so as to form a continuous line, as follows:

> "It is enough that by the lease the connected roads form a continuous line, and it is not essential that the leased line be an extension from either terminus of the lessee's road. *The evil which was intended to be guarded against by this limitation was the placing of parallel and competing roads under one management*, and the control of one company of the general railroad affairs of the state through the leasing of roads remote from its own, and with which it has no physical and direct connection."

In *Mannington* v. *Hocking Valley Railway Company*, 183 Fed. Rep., 133, the court quotes:

> "The general effect of these consolidations and connections has really been to increase competition, has added greatly to the public convenience, and furnished greater and more commodious facilities for traveling; has operated to reduce the cost of transportation; has brought remote parts of the

country into close proximity, as it were, to each other; has developed resources that would otherwise have remained dormant, by opening up the markets of the world to the products of the land; and has generally contributed to work to the welfare and propriety of the people."

In the case of *Dady* v. *Georgia & A. Railway Company*, 112 Fed. Rep., at page 838, of its opinion, the court says:

"Nor do I attach any importance to the contention that the Georgia & Alabama Railway can not consolidate with the Seaboard Air Line, because there is at present no actual connection with the two roads. The statute upon this subject must have a reasonable construction. The roads are now separated by less than a dozen miles, and it appears that the intervening track is being laid as rapidly as possible.

"Nor, in my judgment, is the consolidation and merger of the two roads contrary to the constitution of Georgia, upon the ground that they are competitive, and because such consolidation might tend to defeat competition and to create monopoly. The Georgia & Alabama and the Florida Central & Peninsular Railways start out from Savannah at right angles to each other. They serve to transport freight and passengers from widely-separated sections of two states. No point on either road can be reached in any reasonable time by a passenger starting out on the other. It is true that they cross one or two shallow rivers on which small steamboats occasionally ply, but there is nothing in the proof or in the contention of counsel to satisfy the court that the occasional delivery of freight by these roads to the steamboats in question could reasonably constitute competitive business, in the meaning of the law, or that, if the roads were under identical control, it would tend to create monopoly. The evidence is that most, if not all, the streams in ques-

tion are spanned by the three powerful roads—the Southern Railway Company, the Central of Georgia, and the Plant System; and, if the merged railroads of the defendants should attempt an injurious monopoly of the traffic on these important navigable streams, one or the other of the three competitors would promptly neutralize the monopoly. It is not difficult to perceive that the contemplated system of the Seaboard Air Line, instead of tending to defeat competition must inevitably tend to preserve it. The new system will contribute to the transportation service of the country now so admirably served by the Plant System and its connecting roads, and by the great and powerful system of the Southern Railway, and by the Central of Georgia Railway. Surely, it needs no argument to justify the statement that three great railroad systems serving the Southern states will do much to prevent and make impossible, rather than to create, monopoly in the railway transportation of these states, and will do much to prevent an injurious control, if any such should be attempted, of the vital functions of the common carrier in a territory which, with all of its expanding interests, promises to be richer than the Empire of Rome under a Caesar or a Trajan."

In the case of *The L. & N. Railroad Company* v. *Kentucky*, 161st U. S., 677, the court in its opinion, says:

"Defendant, however, further urges in support of its assumed rights under the third section of the charter of 1856, a contemporaneous construction by the parties in interest, under which several lines were purchased which ran parallel to some of its own branches, and one of which, known as the Cecilia branch, about fifty miles in length, running substantially parallel to its main line, which it purchased and held for a short time, and then sold to the Chesapeake Co. These, however, were local lines which either ran parallel to the branches of the L. &

N., such as the Owensboro and Nashville, and the Bardstown branch, or an extension of its main line, such as the Louisville, Cincinnati & Lexington, running from Louisville to Cincinnati, or a short line like the Cecilia branch, running parallel to the main line; yet, as the terminus at one end or the other was in most cases different, it can hardly be said that any of these were competing lines, or that their purchase showed such an acquiescense on the part of the state as to estop it from opposing the purchase of a through line from Louisville to Memphis, by the way of Paducah—a line which connects the principal termini of the L. & N. Co. by a road substantially parallel, and no part of which is more than 50 miles from the corresponding part of the L. & N. Putting the broadest construction upon what was actually done, it amounts to no more than that the Company made several purchases of local lines, in which the State acquiesced. That the State may have seen fit in particular cases to ratify the acquisition of local lines parallel to certain branch lines of the main road, does not argue that it intended to approve the purchase of parallel and competing through lines, especially in view of the act of June 22, 1858, which limited the power to consolidate or lease to roads so connected as to form a continuous line. Indeed, these acquisitions appear to have been deemed so little in contravention of the public policy of the State, that the General Assembly did not hesitate to confirm them by special acts, and to receive taxes upon them as part of the L. & N system.

"While the doctrine of contemporaneous construction is doubtless of great value in determining the intentions of parties to an instrument ambiguous upon its face, yet to justify its application to a particular case, such contemporaneous construction must be shown to have been as broad as the exigencies of the case require. In this view we can not say that a contemporaneous construction of this charter, which

ratified the purchase of a few local lines, was sufficient to justify the company in consolidating with a parallel and competing line between its two principal termini, with a view of controlling the through traffic from the lower Mississippi to Cincinnati, and destroying the competition which had previously existed between the two lines. It is possible that the Commonwealth might, if it had seen fit to do so, have enjoined the acquisition of some of these parallel lines, and the fact that it did not deem such purchases to be in contravention of public policy ought not to estop it from setting up an opposition to another purchase, which, in its view, is detrimental to the public interests. As is said by Mr. Justice Cooley, in his Constitutional Limitations (6th Ed.), page 85: 'A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances can not be allowed to sanction a clear infraction of the Constitution.' We are, therefore, of opinion that the Court of Appeals was substantially correct in saying that 'though thirty-eight years since the passage of the act of 1856 and thirty-six years since the act of 1858 had elapsed, when this action was commenced, the L. & N. Co. never before claimed or attempted to exercise the right to purchase and hold parallel and competing lines, except about 1878, when it purchased the road from Louisville to Cecilia Junction, which was held only a short time and then sold to the Chesapeake, Ohio and Southwestern Company..

"That the lines proposed to be consolidated are parallel and competing is evident from an inspection of the map, since both connect the two important cities, Louisville and Memphis, which constitute

their terminis, and are natural competitors for the traffic from the Southwestern to the Northwestern States by way of Cincinnati, as well as that in the opposite direction. The object of the consolidation is obviously to enable the L. & N. to obtain a complete monopoly of all the traffic through the western half of the state. Conceding that that part of the Chesapeake line which ran from Elizabethtown to Paducah was originally a branch line of the L. & N., and might have been acquired as such under section 3 of the act of 1856, it ceased to be such after the Cecilia branch was acquired, and the line was extended from Paducah to Memphis. It then became a parallel and competing line within the meaning of the Constitution."

In *Kimball* v. *F. S. Railroad Company*, 46 Fed. Rep., 888, is the following:

"The view that the court entertains of Section 17, Art. 12, of the Constitution of Missouri, and of Section 2569 of the Revised Statutes of the state, which, as it is claimed, rendered the purchase of stock in the Frisco Company unlawful, may be substantially stated as follows: The prohibition contained in the statute (Section 2569) is clearly aimed at railroad companies 'owning, operating, or managing a railroad in the State of Missouri.' If a railroad company owns, operates, or manages a railroad in this state, it is prohibited, among other things, from leasing, purchasing, or exercising any control over any other railroad in the state that is substantially parallel to, or a competitor of, the road so owned, operated, or managed. This is, in substance, the extent of the statutory inhibition. Now, while conceding for the purposes of the present decision, that the Atchison Company at the time of its purchase managed and operated two railroads in this state, namely, one from Kansas City Northeastwardly through the state to

Chicago, and one from St. Louis to Union, in Franklin County, Mo., a distance of about 60 miles, yet the court concludes that neither of these roads was, in the statutory sense, parallel to, or competitor of, the Frisco. It appears to the court obvious that the road from Kansas City to Chicago can not, in any just sense, be said to be a competing line; in explanation of my ruling that the St. Louis, Kansas City & Colorado Railroad, extending from St. Louis to Union, hereafter called the Colorado Company, was not in the statutory sense a competitor of the Frisco, I will say, that when the statute speaks of competing roads it evidently means roads that are substantial competitors for business; it refers to competition of some practical importance, such as is liable to have an appreciable effect on rates, and in that sense the road to Union was not, in my judgment, a competing line.

"The evidence before me discloses the fact that the Atchison Company had abandoned its purpose of constructing the Colorado road beyond Union before its purchased or determined to purchase the Frisco stock. It shows that the Colorado road and the Frisco do not touch any two common points; that between the two roads, for more than 40 miles, the Missouri Pacific Railroad is interposed; that the Colorado road is in reality a suburban road; and that not more than 1 per cent. of its traffic, which is, in the aggregate, infinitesimal, when compared with the traffic over the Frisco, would in any event, pass over the Frisco. All of these considerations lead me to the conclusion that the Colorado road was not a competing line, within the meaning of the statute, and that the Atchison Company was not disqualified from purchasing the Frisco stock, even though it conceded that it operated and managed the Colorado Road at the time of the purchase."

In the case of *Jacobson* v. *W., M. & P. Ry. Co.*, 74 N. W., 893, it is said:

"Appellant's property is dedicated to public use, 'is affected with a public interest,' and the Legislature certainly has the power to regulate that use in a reasonable manner, unless appellant's charter expressly protects it from such regulation (see *Munn* v. *Illinois*, 94 U. S., 126, *State* v. *Wabash, St. L. & P. Ry. Co.*, 53 Mo., 144; *Alnut* v. *Inglis*, 12 East, 527). Appellant was chartered to serve the public within the scope of its charter powers and franchises, in the best and most efficient manner possible. It was not, as it seems to contend, chartered to obstruct public traffic or serve the public the least that self-interest might dictate. Appellant can not be allowed to obstruct the course of public traffic under the claim that, by putting in this connection and letting such traffic take its course, appellant will lose a large amount of revenue which it would otherwise earn."

Regarding the interchange of cars, the court say:

"Such interchange of cars between different railroads is a common and almost universal practice; it would hardly be contended that such an act of interchange is *ultra vires* on the part of a railroad company, * * * as incidental to the operation of its road, a railroad company has the power to interchange cars with other connecting companies, and this is the ordinary and usual way of doing business. We are clearly of the opinion that the Legislature has the power to compel a common carrier to do business in the usual and ordinary way, and therefore may compel such interchange of cars as incidental to the business for which the company was chartered."

This case was affirmed by the court in 179 U. S., 287.

The power of Congress over subject-matter is plenary. It is not safe to rely upon cases decided under state constitutions for the measure of the powers of Congress. But if the above case directly declares the law of Minnesota,

much more has Congress the power to accomplish the same objects. Has it done so? No doubt, Congress has from time to time endeavored its utmost to deal with the great commercial problem that is over-shadowing everything else. In the first and fifteenth sections especially of the Hepburn Act of 1906, as amended in 1910, the problems of rates, discriminations and in fact of all *practices* or methods of conducting traffic are dealt with amply and exhaustively, one could hardly discover any safeguard that the astuteness of man could devise that has not been provided.

The terms "lateral" "branch" are no more capable of exact definition than are the terms "parallel" and "competitive." It is more a question of description than of definition, more a question of fact than of law. But why attempt to use the latter terms at all in defining the former? The act does not use them. It can not be urged that Congress has to stop when it begins to act upon railroads that could not consolidate under state laws because they were parallel and competitive. There is no question of merger or consolidation involved. The very purpose of those state laws is to keep competition alive; to prevent the companies from stifling it. So it is the purpose, at least one purpose, of the Interstate Commerce Law to leave competition untrammeled and to take no account of it save to consider it as affecting rates. In other words to look upon it as an accomplished fact, as a necessary and beneficial status, and neither encourage nor hinder it, but to deal with traffic problems free from the consideration of it except as a necessary adjunct of all transportation business. Any other view tends toward monoply. There is one view of it that makes it a factor. If a rail-

road should be started at the terminus of another and paralleled it right along through every town until it reached its other terminus for the avowed purpose of destroying the business of the other road, and wrecking and eventually acquiring it, or whether avowed or not, if that were the evident design, the beneficial features of the law might be withheld from such an enterprise. But why? Because the law would then be aiding in the eventual destruction of real, healthful competition, and the scheme would be a fraud, but honest competition is a boon to the public, and the law is made for the public benefit. Its effect is restraining.

See 4 Halbury's Laws of England, page 66, where it is said, "In making an order against a railway company to afford facilities, commissioners will consider chiefly the convenience of the public."

Ever since 1854, there have been in England, laws governing railroad traffic enforced by commissioners, many of the provisions of which may have been adopted into the commerce law of the United States and it is not going too far to say that the principle of the above quotation, is the principle that governs our Interstate Commerce Commission. It neither makes nor unmakes railroads, nor does it inquire into the needs of the community and order the building of railroads. The object of the state laws against consolidation, is to prevent two rival railroads from combining under the same management, and this is for the benefit of the public. So that the object of these state laws and the Interstate Commerce Commission laws are one and the same thing, and therefore it is hard to imagine that because the performance of certain acts by railroad companies would be obnoxious

to these state laws, that that prevents the commission from acting in accordance with its powers to accomplish the very same purpose as these state laws seek to accomplish.

Under the laws of Ohio, the Traction Company and the complaining companies are not competing roads. In fact, they are not competing. A certain part of their business is similar, but their principal business is not to struggle for the same traffic. They have not the same termini; who could imagine that any shipper would cart his stuff from a station on the traction line to the Norfolk & Western road to have it taken to Sardinia and thence to Hillsboro, when he could reach the same point on the traction line in one-third of the distance and in one-tenth of the time. And yet in a way the Southern and Northern Pacific are on certain business competitive. Would it be possible to build an extension or a lateral or branch road that would not in a measure, and at some points, compete with the main line? If a line were built at right angles to another from points ten to fifteen miles away on the lateral line, goods could be carted to other roads, and it would get the business, if the lateral road had never been built. A branch line can not be one that is owned and operated by a main line, for then no compulsion would be necessary. Our lines are not parallel because they touch at a point.

The case of *Puget Sound Electric Ry. Co.* v. *Ry. Com.*, at Wash'n, 117 Pac., 739, between different street railway companies, in the statement of the question of competition, furnishes a principle very much akin to that which arises on the circumstances of this case. In that case it was held that:

"Where the railroad has established rates for a street railroad company, and it does not appear that other lines, operating in a part of the territory covered by its lines, have station facilities at any of the points affected by the established rates, except at one or two places, or that they are seeking to handle the traffic or had time schedules to handle it, and where it appears that people living in territory outside of those places, must travel on the appellant's line or be deprived of direct access by railway into certain towns, such other lines are not 'competing lines'; and hence the order of the commission, reducing rates below the rates permitted to be charged by such other roads, can not be discrimination."

CONCLUSION.

The statement of facts in the record and in the brief of the various counsel, including the briefs of counsel for the Government and the Commission, is so full that it has not been thought necessary to make any fuller statement in this brief for the Traction Company, nor to cite the authorities which the Government has heretofore—and possibly has cited in its brief on the subject of the meaning of a lateral road—but merely to discuss on general principles the question whether the Traction Company's road comes within the wording of the law, even if it be an independent, and to a certain degree, competing line.

Respectfully submitted,

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